Supreme Court, U.S.
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No. 95-2063

In The

Supreme Court of the United States

October Term, 1995

TENNA PHIPPS LANG,

Petitioner,

vs.

O. FAYRELL FURR, JR.,

Respondent.

On Petition for a Writ of Certiorari to the South Carolina Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

I. Whether Petitioner's equal protection rights were violated in a state court legal malpractice action by an evidentiary ruling which excluded any reference by her expert legal witness to specific ethical canons or ethical rules but allowed extensive testimony concerning the ways in which the expert believed Respondent, as her attorney, breached the standard of care.

II. Whether South Carolina lacks a definitive standard of care relating to an attorney's communicating an offer of settlement to a client in a civil case and, if so, whether that serves to deny Petitioner equal protection.

III. Whether Respondent's alleged failure as Petitioner's attorney to allow her to participate in jury selection in a state court jury trial implicates any federal constitutional right.

IV. Whether Petitioner's equal protection rights were violated by the granting of a directed verdict to Respondent on the claim that he failed to allow Petitioner to participate in jury selection.

V. Whether Petitioner's equal protection rights were violated by a ruling that, as a matter of law, there was insufficient evidence of proximate cause to support her claim that the Respondent, as her attorney, had failed to move for a directed verdict in the underlying personal injury lawsuit.

VI. Whether Respondent's presentation of the testimony of the trial judge from the underlying personal injury lawsuit implicates any federal constitutional right.

VII. Whether the South Carolina Court of Appeals denied

Petitioner due process and equal protection in refusing to address her argument that there was insufficient evidence to support jury charges on the law of contributory negligence, assumption of risk and estoppel.

VIII. Whether any federal constitutional right of the Petitioner was violated by a jury instruction to the effect that the jury must accept the law as charged by the court and could not be concerned with what they thought the law should be.

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STATEMENT OF THE CASE

The Petitioner, Tenna Lang ("Lang"), instituted a personal injury lawsuit in state court against Lady International health spa, in which she was represented by the Respondent, O. Fayrell Furr, Jr. ("Furr"), a South Carolina attorney. That lawsuit resulted in a jury verdict for the health spa, which was upheld by the South Carolina Court of Appeals. Lang then brought a legal malpractice action in state court against Furr arising out of his representation of her in the earlier case. The jury in that trial found for Furr, and the court of appeals affirmed.[1] The South Carolina Supreme Court denied Lang's petition for writ of certiorari, and her Petition to this Court followed.

The facts of Lang's accident were stated concisely by the court of appeals in its opinion affirming the verdict for the health spa:

> Lang joined the Lady International health spa in April or May, 1984 and worked out at the club practically every day. On July 16, 1984, while exercising at a lateral pull-down station of a universal weight machine, Lang was injured. This particular machine consists of a lateral bar connected to a pulley cable, which is attached to a set of weights. At the time of the accident, the bar was connected to the pulley cable by an open-ended "S" hook. Lang completed her repetitions on the machine, stood up and released the bar, thus allowing the weights to

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1. The opinions of the court of appeals in the malpractice case and in the personal injury case are attached to the Petition as Appendices A and B, respectively. References in this brief will be made to the consecutively numbered pages 1a-14a of the Appendices, which contain the two opinions.

fall freely, causing the bar to come loose from the "S" hook and hit her on the head.

* * *

The record shows the health spa has a policy of giving an orientation program to new customers during which they are shown how to use the various pieces of exercise equipment. Orientation includes instructions on the use of the lateral pull-down machine and patrons are told not to release the bar suddenly while the weights are under tension with the cable.

Although denied by Lang, there is evidence in the record from which the jury could conclude that she did go through orientation. . . .

There is also ample evidence from which the jury could conclude Lang was instructed to release the bar on the lateral pull-down machine slowly and not to let the weights clang. . . .

Finally, there is evidence in the record from which the jury could find that Lang released the bar in a manner which contradicted the instructions given her. There were no eye-witnesses to the accident and Lang testified that she was unsure what happened. However, Kostyskyn, Dennis and Gwinn [employees of the spa] were all present in the spa at the time of the accident

> and each testified to hearing the weights drop or clang.

(App. at 12a-14a).[2]

In August 1985, Furr filed a complaint on Lang's behalf against the health spa and the manufacturer of the exercise equipment, alleging that both were liable for negligence and praying for $5 million in damages. Through discovery, it became apparent that the manufacturer had designed and sold the machine with a proper attachment and that the "S" hook was a modification to the machine made by the health spa itself. Contrary to Lang's implied assertion in the Petition that Furr unilaterally released the manufacturer from liability (Petition at 3), Lang authorized a settlement with the manufacturer for $25,000, and the case proceeded to trial against the health spa alone.[3]

The case against the health spa was tried over the course of three days in October 1987. One of the jurors selected for the trial was Larkin Spivey, who was a neighbor of Lang and whose daughter was a friend of her son. Lang would later testify in the malpractice case that she did not receive a jury list prior to trial and, because Furr told her to go to the wrong courtroom, she was not present when the jury was drawn and struck. She would further testify that she would have insisted Furr exercise a

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2. Thus, contrary to Lang's assertion in the Petition that her injury occurred during "ordinary use" of the machine (Petition at 2), there was specific evidence in the record from which a jury could have concluded that she recklessly disregarded the instructions given her for use of the exercise equipment.

3. In the malpractice case, Lang made no claim based on an alleged unauthorized settlement with the manufacturer.

peremptory strike against juror Spivey because he did not like her family, principally because of the friendship between his daughter and her son, although her son, in his testimony, could not give a specific reason for Spivey to dislike him.[4] In addition, Furr would later testify in the malpractice case that Lang was present during jury selection, that he believed he should exercise a peremptory strike on Spivey and that it was actually Lang and her family who wanted to retain Spivey as a juror because the two children were friends. The attorney for the health spa corroborated Furr's testimony that Lang was present during the striking of the jury. The statements in the Petition to the effect that Furr intentionally directed Lang to the wrong location for jury selection and that Spivey intentionally concealed his antagonism toward Lang and her family (Petition at 16-17) have no basis in the evidence.

During the trial of the personal injury case, the health spa's attorney made a firm settlement offer of $550,000.[5] Lang would later claim in the malpractice case that she was completely unaware of any settlement offer made by the health spa. This question was the central fact issue in the trial of the malpractice case. According to Furr, however, and as corroborated by at least two other witnesses, Lang was fully aware of the outstanding settlement offer and rejected it. The question was presented to the jury at the malpractice trial, and the jury believed Furr.

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4. Spivey later testified in the malpractice case, however, that he bore no bias, prejudice, ill will or malice against Lang or her son and that he believed he was capable of giving both Lang and the health spa a fair and impartial trial.

5. Counsel for the health spa clearly testified in the malpractice action that the highest offer ever actually made by the defense was $550,000, contrary to the assertion in the Petition that settlement offers ranged from $550,000 to $900,000. (Petition at 11). Furr testified that, although there was some discussion about whether defense counsel would seek $750,000 in authority, Lang would not lower her demand below $3 million and, therefore, negotiations broke down.

Several purported factual assertions in the Petition relating to the evaluation of the personal injury case and the settlement considerations are completely without evidentiary support. First, the statement that Furr had specific actual knowledge of the personal belief of counsel for the health spa as to the chances of winning the case (Petition at 13) is without evidentiary support and contrary to common sense since few defense counsel would so openly share their opinions with a plaintiff's lawyer. Second, the statement that the calculations by Lang's expert economist of her financial loss amounted to over $7 million (Petition at 3) is simply false, and the record reflects that his actual calculations as presented at the trial of the personal injury case were slightly in excess of $2 million. Last, the references to the financial status of Furr and his wife and to news coverage of the personal injury trial are completely uncalled for and absolutely irrelevant to these proceedings. Further, there was absolutely no evidence presented at the trial of the malpractice case concerning these matters.

Contrary to Lang's constant references in the Petition to her serious and permanent injuries and to her permanent disability, the extent of her injury was very much in dispute in the personal injury case, and her own doctors at that time opined that, despite a laceration to the head, her main injury was an emotional and psychiatric one, including a diagnosis of post-traumatic stress disorder. In fact, at the trial, the health spa presented the expert testimony of a psychiatrist, who, after reviewing Lang's medical records and examining her, opined that there was no physical basis for Lang's symptoms, that Lang was treatable (not permanently disabled) and that Lang was deliberately exaggerating her injuries.

At the close of the evidence in the personal injury trial, Furr consciously made a tactical decision on the spur of the moment not to move for a directed verdict because he felt that Lang was

winning the case at that point and he did not want to remind defense counsel to make such a motion, thereby providing a basis for an appeal by the defense. The jury returned a verdict for the health spa. Furr appealed on Lang's behalf, and the South Carolina Court of Appeals affirmed, holding that there was sufficient evidence from which the jury could have concluded that Lang was guilty of contributory negligence. (App. at 11a-14a).

Lang filed the malpractice action against Furr in August 1991, alleging in pertinent part that Furr had been negligent in handling the personal injury case by (1) failing to move for a directed verdict, (2) failing to advise her of the settlement offer and (3) excluding her from participating in jury selection.[6] Contrary to Lang's assertion in the Petition that the trial judge in the malpractice case granted four directed verdict motions (Petition at 3), the trial court withheld only two claims from the malpractice jury's consideration. First, the trial court granted Furr's motion *in limine* to exclude evidence of his failure to move for a directed verdict in the personal injury trial. The trial court decided, as a matter of law, that the lack of a directed verdict motion did not proximately cause any harm to Lang since the health spa's liability was necessarily a jury issue as established by the court of appeal's prior decision holding that there was sufficient evidence of contributory negligence. (App. at 4a-5a). Second, at the close of all the evidence at the malpractice trial, the trial court granted Furr's directed verdict motion on Lang's claim regarding the handling of the jury selection process since there was insufficient evidence as a matter of law that Spivey's service on the jury affected the outcome of the personal injury case. (App. at 8a-10a).

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6. Throughout the malpractice action, including the trial, Lang was represented by counsel.

The trial court in the malpractice case also granted Furr's motion *in limine* to exclude any reference by her expert legal witness to specific ethical canons or ethical rules but, contrary to Lang's misrepresentation in the Petition that her expert was prevented from explaining the specific standard of care (Petition at 5), allowed the expert to testify extensively concerning his opinion of the specific breaches of the standard of care. (App. at 6a). During the trial of the malpractice case, Furr called as a witness The Honorable Frank T. McGowan, Jr., who had been the trial judge for the personal injury lawsuit. Judge McGowan was an important witness because, despite Lang's denial, he testified that, during the trial of the personal injury lawsuit, with the consent of all parties, he spoke with Lang concerning the settlement offer to assure himself that Lang understood it was a substantial offer and to urge her to consider it. Like any other witness, Judge McGowan was subpoenaed to attend the trial, and his testimony was relevant and entirely proper. The statement in the Petition that Lang was surprised by Judge McGowan's appearance at the trial is belied by her complaint that he was not available for her counsel to depose, which indicates that she knew he might be called as a witness. (Petition at 27).

The jury returned a verdict for Furr in the malpractice case, and Lang appealed. Although Lang appeared *pro se* throughout much of the appeal process, at oral argument she was represented by South Carolina attorney James H. Lengel. The court of appeals affirmed the jury verdict for Furr on July 18, 1995. In doing so, it addressed only the following three issues, finding that the other issues presented in the brief were either not preserved for appeal, abandoned or manifestly without merit: (1) the exclusion of evidence relating to Furr's failure to move for a directed verdict in the personal injury trial; (2) the exclusion of any reference by Lang's expert witness to ethical rules; and (3) the directed verdict on the claim that Furr allegedly excluded Lang from participation in jury selection. None of the issues

actually decided by the South Carolina Court of Appeals involved any question of federal law.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION OVER THE CLAIMS PRESENTED BECAUSE THEY WERE NOT PROPERLY RAISED IN STATE COURT.

The jurisdiction of this Court is limited to specific instances of denials of federal rights, specially set up in state court and denied by the rulings and judgment of the state court. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909). *See also New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937) (jurisdiction lacking unless the federal question presented was raised in state court and denied there). To establish jurisdiction, the rules of this Court require that a petitioner specify when the federal questions sought to be reviewed were raised in the state trial and appellate courts, the method or manner of raising them and the way in which they were ruled on by those courts. Rule 14.1(g)(i), United Supreme Court Rules.

The Petition in this case contains absolutely no statement of when Lang raised in the South Carolina state courts the issues that she now presents. This is so because Lang utterly failed to preserve any of the questions for which she seeks review. The actions of the state courts to which Lang now takes exception fall into four basic categories: (1) never challenged on any ground in the state trial or appellate courts (Question II); (2) challenged on state grounds only in the state appellate court but not challenged or properly preserved in the trial court (Questions I and VI); (3) challenged on state grounds only in the state trial and appellate courts (Questions III, IV, V and VII); and (4) challenged on

federal constitutional grounds in the state appellate court but not on any ground in the trial court (Question VIII).

With one exception, Lang has never raised a federal question prior to the Petition to this Court. The one constitutional question that she did raise in the state appellate court concerned a jury instruction to the effect that the jury must accept the law as charged by the court and could not be concerned with what they thought the law should be. Lang did not object to this jury instruction at trial, and the South Carolina Court of Appeals did not address the issue in its opinion since it was not properly preserved. (App. at 4a). Therefore, this Court lacks jurisdiction of this purported constitutional question. *Louisville & Nashville Railroad Co. v. Woodford*, 234 U.S. 46 (1914) (jurisdiction lacking where highest state court declined to pass on question because not appropriately raised in trial court in the manner required by state practice).

The Court should deny Lang's Petition on jurisdictional grounds because she did not properly preserve any federal questions for review.

II.

THIS COURT ALSO LACKS JURISDICTION BECAUSE NONE OF PETITIONER'S CLAIMS PRESENT A COLORABLE FEDERAL QUESTION.

This Court is without jurisdiction where the assertion that a federal question exists is devoid of merit and without substance. *See New Orleans Waterworks Co. v. Louisiana*, 185 U.S. 336 (1902) (appellate jurisdiction).

The equal protection and due process concerns raised by Lang are blatantly frivolous. The matters of which she complains

relate to evidentiary rulings under state law (Questions I and VI); state substantive law as to the standard of care for attorneys in legal malpractice actions (Question II); and rulings on the sufficiency of evidence either to support a claim (Questions III, IV and V) or to support a jury instruction (Question VII). These issues do not implicate Lang's federal constitutional rights in any conceivable way.

Lang's last question (Question VIII) challenges the state trial court's jury instruction to the effect that the jury must accept the law as charged by the court and could not be concerned with what they thought the law should be.[7] Lang asserts that a jury has the right to decide the law as well as the facts. This is not a federal constitutional question. In some instances, pursuant to express state statutory or constitutional provisions, juries in certain criminal trials are allowed to determine the facts and the law. 75A Am. Jur. 2d *Trial* § 813 (1991). This principle, however, is a departure from the general rule that the court and jury have separate and distinct functions, that is, for the court to be the sole arbiter of the law and the jury of the facts. 75A Am. Jur. 2d *Trial* §§ 714 and 715 (1991). Furthermore, the Seventh Amendment to the United States Constitution, which preserves the right to trial by jury, is not applicable to proceedings in state court. *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917); 47 Am. Jur. 2d *Jury* § 5 (1995). In addition, Lang's position is wrong on the merits since, under South Carolina law, the jury instruction was correct. *See* S.C. Const. art. V, § 17 (1973) ("Judges shall not charge juries in respect to matters of fact, but shall declare the law").

Because Lang does not present a colorable claim that she was denied any federal constitutional right, this Court should deny the Petition for lack of jurisdiction.

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7. As discussed in part I of this brief, Lang did not object to this jury instruction at trial.

III.

THE COURT SHOULD DENY THE PETITION, IN ITS DISCRETION, SINCE THE SOUTH CAROLINA COURTS DID NOT DECIDE ANY QUESTIONS OF FEDERAL LAW.

This Court's rules provide that a petition for writ of certiorari will be granted only for compelling reasons and generally only in certain situations, including but not limited to those in which a state court of last resort (1) has decided an important federal question in a way that conflicts with a decision of another state court of last resort, with a decision of a United States court of appeals or with relevant decisions of this Court or (2) has decided an important question of federal law that has not been, but should be, settled by this Court. Rule 10(b) and (c), United States Supreme Court Rules. Further, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10, United States Supreme Court Rules. Given these considerations, the Court should deny this Petition.

A review of the South Carolina Court of Appeals' opinion plainly indicates that it did not actually decide any issue of federal law. (App. at 1a-10a). Therefore, that court's opinion necessarily does not conflict with other applicable decisions. Further, the errors asserted by Lang are simply reconstituted challenges to the state courts' evidentiary rulings and rulings as to the sufficiency of evidence. The court of appeals rendered no decision on any question of federal law because none was ever properly presented to it. Given the lack of any state court decision on a question of federal law, the Court should exercise its discretion to deny the Petition.

CONCLUSION

In summary, this Court lacks jurisdiction of the questions presented by Lang. Not only did she fail to properly raise these issues in state court, but the questions presented also fail to present a colorable claim that she was denied any federal right. Last, since the state appellate court did not actually decide any federal questions, the issues are not appropriate for this Court's discretionary review. Therefore, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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